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Case Citations

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 785

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATURAL GAS UTILITY DISTRICT OF HAWKINS COUNTY, TENNESSEE

I. STATUTES INVOLVED

In addition to the statutes involved referred to on page 2 of petitioner's brief, certain other relevant provisions of the Tennessee Code (Sections 5-501, 5-601, 6-1507, 6-2617, 6-2608, 6-2612, 6-318, 6-604, 8-3811 and 9-1202[a]) Article 6, Section 15 of the Constitution of the State of Tennessee; Tennessee Private Acts of 1963, Chapter 8, Sec-

tion 4, and Sections 117-13, 117-18(6), and Section 117-16 of the General Statutes of North Carolina, are set forth in the Appendix, infra, pp. A1-A13.

II. ANSWER TO "QUESTIONS PRESENTED"

Respondent disagrees with petitioner's statement of the "Questions Presented." "Whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created under state law is a political subdivision of the state and, therefore, not an employer subject to the Act," is not the true issue in this case. Respondent agrees that state law is not controlling, but is merely one factor to be considered.

Petitioner has stressed only a few sentences from the opinion of the Court of Appeals below, which opinion is several pages long (R. 149-155) and, it is submitted, the petitioner has created and presented a false issue here that the Court of Appeals' decision was solely based on the state characterization of a utility district as a "municipality".

Respondent's explanation for the few sentences stressed by the Board is the same as the Board's explanation, in footnote 14, page 19 of its brief, about one of its decisions holding state law to be *controlling*, "the language was not necessary to the result reached."

An examination of the entire opinion of the Court of Appeals compels the conclusion it was correctly decided and is in agreement with the rule of *National Labor Relations Board* v. *Randolph Electric Membership Corporation*, 343 F.2d 60, repeatedly cited by the Board as the "law of the case", and the case it relied on as creating a "conflict" when seeking certiorari to this Court.

Actually, the so-called coverage determination here, in fact, involves whether or not the Board has jurisdiction. The Board originally bestowed jurisdiction on itself and, thereafter, has repeatedly[1] refused to reconsider same.

Jurisdiction can be raised at any time in a proceeding. In *National Labor Relations Board* v. *Mark J. Gerry, Inc.*, 355 F.2d 727, Cert. Denied, 385 U.S. 820, the court refused to enforce that portion of a board order cancelling a labor agreement and stated, in footnote 1, on page 729, the following:

> "We disagree with counsel that the matter may not now be considered because respondent failed to object when the case was still before the Board. The question is one of whether the Board acted in excess of its jurisdiction and hence can be asserted initially in an enforcement proceeding for, as the Supreme Court said . . .
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> > 'Since the court is ordering entry of a decree, it need not render such a decree if the Board has patently traveled outside the orbit of its authority so that there is legally speaking no order to enforce. *N. L. R. B.* v. *Cheney California Lumber Co.*, 327 U. S. 385, 66 S. Ct. 553, 554, 90 L.Ed. 739 (1946).'
>
> Moreover, the matter was called to the Board's attention. The record reveals that respondent duly excepted to the order on the ground that 'the Labor Board does not have jurisdiction to cancel or modify vested rights of a binding valid contract of the employees'."[2]

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1. Respondent raised the question of jurisdiction to the Board at least three times in addition to the original hearing. (R. 1-2)

2. Also see *National Labor Relations Board* v. *Alside Inc.*, 192 F.2d 678, 679. The court said in reference to enforcing a Board order: "This raises a question of jurisdiction, and we *must* entertain it." (Emphasis added) Accord: *National Labor Relations Board* v. *Cowell Portland Cement Company*, 198 F.2d 198.

In *Cardillo* v. *Liberty Mutual Co.*, 330 U.S. 469, 473 (1947), it was stated by this Court:

> "In reviewing an administrative order, it is ordinarily preferable where the issue is raised and where the record permits an adjudication, for a federal court first to satisfy itself that the administrative agency or officer had jurisdiction over the matter in dispute."

Since the great majority of the facts are here agreed to, and this is basically a jurisdictional matter, many of the cases cited by the petitioner relating to the efficacy of Board findings of fact on appeal are not here controlling.

The correct standard in this case for the appellate court is that stated in *Randolph*, supra, at page 62:

> "*To the extent* that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." (Emphasis added)

III. ANSWER TO "STATEMENT"

A. The Board's findings of fact.

Respondent agrees in part with this portion of petitioner's brief. On page 3 of its brief, the petitioner states: "The facts with respect to the District's status as an employer under the Act are as follows."

The petitioner then sets out some facts and also some argumentative conclusions which it calls facts; also it does not list many other uncontroverted facts in this record with respect to the District's status as an employer under the Act.

Respondent desires to set out the following additional undisputed facts:

(a) The Natural Gas Utility District of Hawkins County, Tennessee, is only one of nearly 270 utility districts in the 95 counties in the State of Tennessee. (R. 102)

(b) Any district established under the Utility District Law of 1937 (R. 22-54) is specifically empowered under Section 6-2608, Tennessee Code Annotated:

> "to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, etc., or two or more of said systems—and to carry out such purpose it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems within or without the district - - -." (R. 43-47)

(c) The Utility District Act was passed by the Tennessee legislature to provide a municipal corporate arrangement to furnish certain needed governmental services, usually in small towns and rural areas, including, but not limited to, the foregoing listed services; these services were not, and, usually could not be, otherwise provided (R. 103); Section 6-2607, T.C.A., provides that the district, when formed, "shall be the sole public corporation empowered to furnish such services," so long as the district continues to furnish any of the services which it is herein authorized to furnish. (R. 41)

(d) The County Judge who appoints the first commissioners, and who fills vacancies in the event the commissioners cannot agree among themselves, is himself a publicly elected official, as provided by the Tennessee Constitution. (R. 39, 49; App., infra, pp. A12-A13)

(e) Commissioners serve with only very nominal compensation. (R. 50)

(f) By Section 6-2613, T.C.A., utility districts are specifically exempt from state regulation by the Tennessee Railroad and Public Utilities Commission, even though privately owned public utilities are specifically covered. (R. 29)

(g) Section 6-2615, T.C.A., designates a utility district's records as "public records". (R. 50)

(h) Apart from the Utility District Act, Section 6-318, T.C.A., "Municipal Property and Services," Section 6-604, T.C.A., in the municipal corporation section, and Section 9-1202, T.C.A., dealing with revenue bond refinancing, refer to and/or characterize a utility district as a "municipality". (R. 87-88; App., infra, pp. A1-A3, A4, A10)

(i) Under several federal statutes, including 42 U.S.C. 418 (and its counterpart in the Tennessee Code, §8-3811), recognition is given to the fact that a utility district is a governmental entity; and arrangement is provided for voluntary coverage to provide social security benefits to district employees, rather than mandatory coverage required of non-governmental entities. (R. 87)

(j) Interest earned on a utility district's bonds is exempt from Federal Income Tax. (R. 86)

(k) A district's bonds are tax exempt, except for estate, inheritance and transfer taxes. (R. 36-37)

(l) The district is required to publish its annual statement in a newspaper of general circulation by Section 6-2617, T.C.A. (R. 31-32)

(m) The district not only has the power of eminent domain, as petitioner mentions, but can exercise it even against other governmental entities. (R. 28-29)

(n) The state legislature passed this act to provide a municipal corporate arrangement to furnish certain required services not feasibly done otherwise. (R. 82, 103)

(o) Section 6-2612 of the Utility District Act is a general grant of power and vests in the district *"all the powers necessary and requisite—capable of being delegated by the legislature."* (Emphasis added) (R. 29)

(p) Section 6-2614, T.C.A., as amended, provides that in certain counties, the three commissioners be appointed until the first of the month following the next general election and, at that election, the commissioners be elected for terms of 2, 4 and 6 years by the qualified voters of the district. (R. 49)

(q) Vacancies, other than those filled as above, are filled by vote of the remaining commissioners. If they fail to agree, the fact is certified to the County Judge, who appoints the new commissioner. (R. 49)

(r) The general ouster law of Tennessee, available for ouster or removal of elected officials, applies to the district's commissioners. (R. 30; see notes after §6-2614, T.C.A.)

(s) Under a recent amendment to Section 6-2617, T.C.A., a copy of the annual statement or audit for the district must be forwarded to the office of the controller of the Treasury of the State of Tennessee within thirty (30) days from the date of its publication. A copy of such annual statement or audit must be filed with a County Judge or Judges. (App., infra, p. A9)

It is submitted, the true questions presented here are

(1) Whether or not under existing federal law, the Board properly determined petitioner was "an employer"

under Section 2(2) of the Act and not exempt as a "political subdivision".

(2) Whether or not the Court of Appeals under existing federal law and applying the correct standard of judicial review properly denied enforcement of the Board order since petitioner was exempt as a "political subdivision".

On page 4 of petitioner's brief, the following are listed among the alleged facts with respect to the district's status as an "employer" under the Act:

> "The powers of the district are vested in and exercised by the three-member board of commissioners, *who are not subject to state or county regulation.* (Emphasis added). *Neither the state nor the county has any control over the District's employees, and they are not considered state or county employees . . .*" (Emphasis added)

It is submitted that these statements, rather than being facts, are actually dubious and/or argumentative conclusions when considered in the light of all the truly undisputed facts, including (a) through (s) listed on pages 5 through 7, supra.

It is further clear that similar conclusions of the Board, in its Decision and Direction of Election, either are not supported by any evidence in the record or are improper interpretations of same. (R. 61-66)

For instance, the Board concludes (a) that "the respondent conducts its business without supervision of the State or any political subdivision thereof", and (b) the district is "not administered by State-appointed or elected officials." (c) It is further concluded by the Board that "the Employer is completely autonomous in the conduct of its day-to-day affairs, with the State exercising nc

supervisory role with respect thereto, or reserving any power to remove or otherwise discipline those responsible for the Employer's operations." (R. 62-64)

Also, as a footnote (footnote 2 on page 4 of its brief), the Board summarily disposes of the very compelling fact that the law provides in districts of a certain size that the commissioners are elected by the qualified voters in general elections. While, as the Board indicates, this does not apply to Hawkins County, does this fact not rather clearly show the political nature of a utility district?

One other observation must be made about the facts. Section 6-2613, T.C.A. (R. 29), specifically exempts a district from the regulation by the State Railroad and Public Utilities Commission required of a private utility. This is done *because* of a district's governmental nature.

What is significant about this is that the National Labor Relations Board has misunderstood the significance of this exemption from state regulation throughout this entire proceeding.

B. The decisions of the Board and the Court of Appeals.

In its brief, on page 6, petitioner, in referring to the initial board decision, states that despite the fact that the Supreme Court of Tennessee had characterized districts as "arms or instrumentalities" of the state,

> "The Board examined the relevant factors and concluded that the District was 'an essentially private venture with insufficient identity with or relationship to the State of Tennessee to support the conclusion that it is an exempt governmental employer under the Act.' "

There is, however, that large number of relevant factors above set out which are in this record and which the Board apparently has failed to consider.

Similarly, in reference to the Court of Appeals' decision, on page 7 of its brief the Board quotes only several sentences from the very end of the opinion below in order to persuade this Court that the Court of Appeals' decision was based solely on a state characterization. What petitioner does not do is recognize that the Court of Appeals below had, for several pages, followed the *Randolph* rule but merely distinguished the facts.

As aforesaid, respondent's explanation here for the few sentences stressed by the Board is exactly the same as the Board's explanation, in footnote 14, on page 19 of its brief, of its own 1960 ruling in *New Bedford, etc., Steamship Authority,* 127 NLRB 1322, holding state law *controlling,* namely that the language "was not necessary to the result reached."

Accordingly, the following is also quoted from the opinion below reported at 427 F.2d 312 on page 313, so that this Honorable Court may view that opinion as a whole:

> "Section 6-2607 of the Tennessee Code, under which the Utility District was organized, provided that a District is a 'municipality or public corporation in perpetuity under its corporate name and the same shall be in that name a body politic and corporate with power of perpetual succession, but without any power to levy or collect taxes.'
>
> The Supreme Court of Tennessee construed this statute in *First Suburban Water Util. Dist.* v. *McCanless,* 177 Tenn. 128, 146 S.W.2d 948 (1941), and held that a District organized under it was a municipal corporation and as such was an arm or instrumentality of the state.

The Board declined to follow the decision of Tennessee's highest court, relying instead on *NLRB* v. *Randolph Elec. Membership Corp.*, 343 F.2d 60 (4th Cir. 1965), which case involved private non-profit utility corporations organized under the laws of North Carolina, which were formed for the exclusive benefit of their own members, did not have the power of eminent domain, were not subject to substantial control or supervision, and did not exercise any portion of the sovereign power of the state. The Board reasoned:

> 'The Utility Districts are not created directly by the State. They are formed by petition of property owners upon a County Judge's determination of the feasibility thereof. Thus, the District is no more a direct creation of the State than such privately-owned public service companies as railroads, and motor carriers, which also require some form of governmental approval, such as a certificate of convenience and necessity.' (App., p. 15 n. 7).

This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certificates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission, and was exempt from all state taxes.

Reliance by the Board on *Randolph* is misplaced. In *Randolph*, unlike our case, there was no holding by the state's highest court that the private utilities were political subdivisions of the state.

In *Randolph* the private utilities were 'formed for the exclusive benefit of its own members.' Here, the District was formed for the benefit of the inhabitants of the community.

In *Randolph*, the utilities involved did not have the power of eminent domain. Here, the District not only has the power of eminent domain but also can exercise it over other governmental entities.

The Commissioners of the District further have the power to subpoena witnesses and to administer oaths. The District's records are 'public records.' The District is required to publish its annual statement in a newspaper of general circulation. Income from its bonds is claimed to be exempt from federal income taxes. Social Security benefits for its employees are voluntary instead of mandatory as the District is considered 'a political subdivision' under 42 U.S.C §418(5).

In our opinion, it was not necessary that the District be created directly by the state in order to constitute a political subdivision. It is sufficient if the District be created in conformity with state law.

It should be noted that the Act does not require agencies of either federal or state governments to be created directly. As a matter of fact, wholly owned government corporations, including the Federal Reserve Bank and even non-profit hospitals, are specifically exempt.

Under Tennessee law the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity therefor. The county judge appoints the first three commissioners nominated in the petition seeking formation of the District, and fills vacancies in the event the commissioners cannot agree among themselves. In counties having a population of 482,000 or more the commissioners of the Districts are elected at regular general elections. Although the District involved in the present case did not have the requisite number of residents to necessitate the election of its commissioners, this factor indicates that Tennessee considers the functions of a District to be that of a 'political

subdivision' requiring election of commissioners by the electors when the District encompasses a specified population." (R. 150-152)

Another ground for the decision herein by the Court of Appeals for the Sixth Circuit was that the Board had not here even followed its own prior decisions, 427 F.2d 31, 314 (R. 152-153) citing *Mobile Steamship Authority, etc.*, 8 NLRB 1297 (1938); *Oxnard Harbor District*, 34 NLRB 1285 (1941); *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954); *New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, 127 NLRB 1322 (1960).

Also the late Board decision, *City of Austell Natural Gas System and International Chemical Workers Union*, 186 NLRB #44, decided October 31, 1970, is nearly identical to the case at bar except that this case holds the gas system exempt under Section 2(2) of the Act.

Accordingly, it is submitted, petitioner in its brief, as it has done since its earliest decision in this matter, has failed to consider all the undisputed facts in the record.

Petitioner has also failed to adequately set forth and explain the opinion below of the Court of Appeals for the Sixth Circuit.

IV. SUMMARY OF ARGUMENT

I.

The real issue in this case is not whether federal or state law controls in determining whether an entity is a political subdivision within Section 2(2) of the Act. Respondent concedes that state law is not controlling but is merely one factor in the determination. The real ques-

tion here is whether the Board properly determined that the respondent utility district was not exempt. And the further question is whether the Court of Appeals properly denied enforcement of the Board's order because respondent is exempt.

Respondent agrees with and accepts the rule of the *Randolph* case, *National Labor Relations Board* v. *Randolph Electric Membership Corporation*, 343 F.2d 60, "To the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." Respondent contends the Board inadequately considered the economic realities and the statutory purposes, and the Court properly did not enforce its order.

It is the position of the respondent, based on the factors that the Board included in its Decision and Direction of Election, as contrasted with the factors listed by the Court of Appeals below, whether the matter be considered in terms of the totality of the picture, or of the strength of the particular economic factors, that the Board inadequately considered the economic realities and, therefore, improperly determined that the utility district was not exempt. On the other hand, the Court of Appeals fully and completely considered the economic realities and decided that the utility district was exempt as a political subdivision.

It is, further, the position of the respondent that the language from the opinion of the Court of Appeals so strongly relied upon by the Board to create the issue that state law is controlling, must be considered in light of the entire opinion of the Court, wherein it examined numerous relevant economic factors at length. The language so relied upon by the Board to create this issue and also

to create the "conflict", which was the basis of this Court granting certiorari, is, at most, "not necessary to the result reached." (This is the same characterization that the Board gave, in its brief in footnote 14 on page 19, to the language from its decision in *New Bedford, etc. Steamship Authority*, 127 NLRB 1322, a 1960 *decision*, holding state law to be *controlling*!)

In reference to the particular factors that are considered important, the Board has introduced what appears to be a new factor: "how the employment relations are carried on", which factor does not appear in any of its decisions heretofore, or since; the Board states on page 15 of its brief that "this factor is controlling", even though, on page 11 of its brief, the Board quotes, although in not exactly the same words as in the *Randolph* case, what it characterizes as how it has "limited the exemption on a national basis to entities that are (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." (The second part of this actually reads in the *Randolph* decision, instead of the language as used by the Board, "administered by state appointed or publicly elected officials." There is a substantial difference, as will be pointed out hereinafter, between the language in the *Randolph* case and the language as changed in the Board's brief.)

In any event, in addition to all the other strong factors present in this case, the Board completely misunderstands the fact that a county judge who appoints respondent's commissioners and fills vacancies is to a county the same as a mayor is to a city or a governor to a state. This office is not only created by the Tennessee Constitution but is specifically made therein one elected by

the qualified voters. The Board further misunderstands the fact that just as an actual employee, such as a city garbage collector or a state highway patrolman, is not supervised directly by either the mayor or the governor, that, similarly, the district's employees are not supervised directly by the county judge. There are middle management supervisory employees in a city, a state and a utility district.

It is the position of respondent that of all the cases wherein the political subdivision has been granted none has as many factors, or as strong factors, as does the district here.

II.

As far as judicial review is concerned, it is submitted that the utility district repeatedly has raised the question of jurisdiction before the Board, but the Board, once having bestowed jurisdiction upon itself, repeatedly refused to reconsider same.

It is further submitted that since most of the facts herein are agreed upon, and since this is a jurisdictional and/or a coverage matter which does not address itself to the expertise of the Board in the usual sense, many of the cases cited by the Board dealing with the efficacy of Board findings of fact on appeal are not here controlling. Nor is the Board's contention correct that this was improperly tried de novo by the Court of Appeals. The Court of Appeals followed the standard of judicial review set forth in the *Randolph* case, but simply held that the Board had not adequately considered the relevant factors and properly refused to enforce the Board's order.

V. ARGUMENT

Background

The issue in this case is not whether federal rather than state law governs the determination, under Section 2(2) of the National Labor Relations Act, whether an entity created under state law is a "political subdivision" of the state, and therefore, not an "employer" subject to the Act. Petitioner agrees that state law is not controlling, but is only one factor to be considered.

However, the present status of the case *of National Labor Relations Board* v. *Hearst Publications*, 322 U.S. 111, on which the Board so heavily relies on pages 9 and 10 of its brief, is doubtful. Congress' adverse reaction to this Court's interpretation of the Act in the *Hearst* case is clearly manifested by the legislative history of the Taft-Hartley amendments to the definitions of "employer" and "employee":

> "It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act *whatever meaning it wished.* On the contrary, Congress intended . . . that the Board give to words not far-fetched meanings but *ordinary meanings.*" (Emphasis added)
>
> . . .
>
> "The Board (in Hearst) expanded the definition of the term 'employee' beyond anything that it had ever included before, and the Supreme Court, relying upon the theoretic 'expertness' of the Board, upheld the Board . . . It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. . ." H.R.Rep. No. 245, 80th Cong., 1st Sess. 18 (1947)

THE TRUE QUESTIONS PRESENTED HERE ARE:

(1) Whether or not under existing federal law, the Board properly determined petitioner was "an employer" under Section 2(2) of the Act and not exempt as a "political subdivision".

(2) Whether or not the Court of Appeals under existing federal law and applying the correct standard of judicial review properly denied enforcement of the Board order since petitioner was exempt as a "political subdivision".

The correct effect of a determination by the Board as to whether an entity is or is not a "political subdivision" is, as aforesaid, set forth by the Court of Appeals for the Fourth Circuit in the case of *National Labor Relations Board* v. *Randolph Electric Membership Corporation*, supra, ". . . to the extent that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect."

Among those economic realities is state law, as set forth in the statutes of the state and the judicial holdings of state courts. Various Board decisions, as set forth hereinafter, hold that state law is to be considered as one of the factors, but that state law will not "exclusively" control. Interestingly enough, some Board rulings have held state law to be controlling; the Board often relies on state law when it supports its position!

It is submitted that the Court of Appeals below followed the *Randolph* rule, properly considered whether the Board followed the correct procedure and, finding that the Board did not adequately and properly consider the economic realities, as well as the statutory purposes, and/or evaluate the total picture, did itself then consider

all of the economic realities, including state law, and correctly determined that the respondent utility district *is* a "political subdivision" of the State of Tennessee.

1. The total picture.

An examination of the Board's Original Decision and Direction of Election shows that the Board apparently considered only the following criteria in its determination and did not, in fact, follow the *Randolph* rule:

1. The respondent is organized to supply gas utility service without profit. (R. 62)

2. "The Respondent conducts its business without supervision of the State or any political subdivision thereof. It hires its own employees and sets their terms and conditions of employment."[3] (R. 62)

3. It has the usual powers of a private corporation to sue and to be sued, to incur obligations, issue bonds, sell and encumber its property and enter into contracts necessary or convenient to the exercise of its granted powers. (R. 62)

4. It then considered state statutes and state court decisions and stated "while such state law, declarations and interpretations are given careful consideration by the Board, they are not necessarily controlling." (R. 63)

The Board then mentioned the *Randolph* rule and reached its determination that the petitioner was not exempt.

The Board did not follow, or even mention, the ruling of its own Regional Director, dated one month earlier, that the Utility District of Weakley, Carroll, and Benton

3. This, it is submitted, is, in part, an argumentative conclusion.

Counties, Tennessee was exempt as a political subdivision. This district is identical to the one in the case at bar. (R. 110-112)

Further, even in its brief in this Court, the Board still has mentioned only a few of the relevant undisputed factors which have been heretofore pointed out, although in footnote 14 on page 18 of its brief it insists "The Board also considered the other factors urged by the District in support of its claimed exemption."

In contrast to the approach of the Board was the approach of the Court of Appeals. The Court considered many more factors than the Board. The following are some of the factors listed by the Court of Appeals:

(1) The Court of Appeals considered that both the Tennessee legislature by Section 6-2607, T.C.A., and the Tennessee Supreme Court in *First Suburban Water Utility District* v. *McCanless*, 177 Tenn. 128, 146 S.W.2d 948 (1941) had determined a district to be a "municipality". (R. 150)

(2) The Court of Appeals referred to the fact, in distinguishing the *Randolph* case, that the utility district has the power of eminent domain, and even has it against other governmental entities. (R. 150-151)

(3) The Court of Appeals declined to agree with the conclusion of the Board that "the District is no more a direct creation of the State than such privately owned public service companies as railroads, and motor carriers, which also require some form of governmental approval such as a certificate of convenience and necessity." (R. 150-151)

As the Court of Appeals pointed out, "This reasoning is obviously fallacious because privately owned railroads and motor carriers, even though they may have certifi-

cates of convenience and necessity, are operated for profit of their owners, whereas the District is owned and operated by the state, and not for the profit of private individuals. The District, unlike railroads and trucking companies, is a public corporation and was not subject to regulation even by the State Public Utilities Commission and was exempt from all state taxes." (R. 151)

(4) The Court of Appeals further distinguished the *Randolph* case by showing that the electric membership cooperative in Randolph was formed for the exclusive benefit of its own members.

In its brief on pages 16 and 17, the Board still shows it does not understand the difference between the electric membership cooperative in *Randolph* and a Tennessee utility district. This will be further discussed hereinafter.

It is submitted that, contrary to the Board's statement, membership in the North Carolina cooperative is *not* available to all applicants, and inhabitants of the area may be served from other sources, but that the Tennessee utility district is the exclusive source of the service for all persons in its district. (R. 150)

(5) The Court of Appeals relied on the facts that the district had the power to subpoena witnesses and administer oaths. (R. 151)

(6) The Court of Appeals considered that a district's records are "public records". (R. 151)

(7) The Court considered that a district is required to publish its annual statement in a newspaper of general circulation. (R. 151)

(8) The Court of Appeals considered that income from a district's bonds is "claimed to be exempt from federal income tax." (R. 151)

(9) The Court of Appeals considered that social security benefits for a District's employees are voluntary instead of mandatory, as a District is considered a political subdivision under 42 USC §418(5). (R. 151)

(10) The Court of Appeals also stated that it was not necessary that the District be created directly by the state. "It is sufficient if the district is created in conformity with state law." (R. 151)

(11) The Court of Appeals pointed out that certain wholly owned government corporations including the Federal Reserve Bank and even non-profit hospitals are specifically exempt. (R. 151-152)

(12) Further, the Court of Appeals referred to the fact that the District is created by petition to the county judge, an elected official, who must find a public convenience and necessity. (R. 152)

(13) The Court of Appeals referred to the part of the statute that provides that in counties of a certain size, the commissioners are elected at regular general elections. (R. 152)

The United States Supreme Court has held that the Board should consider all the relevant factors.

In the case of *National Labor Relations Board* v. *Jones and Laughlin Steel Corporation*, 331 U.S. 416 (1947), an order of the National Labor Relations Board with reference to which union should represent certain employees was involved. The Court stated:

"The proper determination as to any of these matters, of course, necessarily implies that the Board has given due consideration to *all* the relevant factors. . . ." (Emphasis added)

Under this rule, the Board must consider *all* of the relevant factors and not give consideration only to those factors which support its decision.

2. Particular Factors.

A. Eminent Domain:

The Board dismisses the possession by the District of the right of eminent domain as a controlling factor, even though the Board itself, in *New Jersey Turnpike Authority*, 33 LRRM 1528 (1954), has held the presence of the power of eminent domain to be a determinative factor in determining an entity to be a political subdivision. Thus, the Board, as pointed out by the Court of Appeals below, has not followed its own decisions, including the *New Jersey Turnpike Authority* case.

B. State Law:

The Board has wandered all over the map as to the effect of state law.

In the Board's 1960 decision of *New Bedford, Wood's Hole, Martha's Vineyard, etc., Steamship Authority*, supra, it was held that the entity considered in that case was a political subdivision, which decision was controlled by state law. The Board in its brief herein states, in footnote 14 on page 19, that "The language in New Bedford - - - was not necessary to the result reached there."[4]

4. It is quite important that the Board recognizes this rule because, similarly, the two paragraphs in the Court of Appeals' opinion so strongly relied on by the Board here (see page 7 of its brief) are not necessary to the result reached below!

Also, in the very late case of *Lewiston Orchards Irrigation District*, 186 NLRB #121, 75 LRRM 1430 (Nov. 25, 1970), the Board stated that it *does* consider "a state code and its interpretation by the state courts", though it says it does not give controlling weight to same, in determining whether an entity is an "employer" for purposes of the National Labor Relations Act, citing *International Brotherhood of Electrical Workers*, 87 NLRB 99, 100-101 (state law was the *only* thing considered by the Board in that case).

In the *Lewiston* case, the Board, in its decision, gave considerable weight to the state court decision of *Lewiston Orchards Irrigation District* v. *Gilmore*, 53 Idaho 377, 23 P.2d 720 (1933).

Yet almost grudgingly on page 15 of the Board's brief herein, it is stated "a state's characterization - - - is a factor to be considered."

Could it possibly be, the Board follows state law when its position is supported thereby?[5]

C. Operations for profit:

The Board pays little attention here to the fact that a district is a non profit entity. It has even analogized a district to a railroad or motor carrier. The Court of Appeals below correctly distinguished between the two types of entities when it pointed out that public service companies are for profit of their owners, whereas the district is not operated for the profit of anyone, including private individuals.

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5. The Board, in footnote 7 on page 13, even includes some language from a Tennessee Court of Appeals decision about utility district employees which it must feel is favorable to its present position! *Weakley County Municipal Electric System* v. *Vick*, 43 Tenn. App. 524, 309 S.W.2d 792, 796.

This distinction is correct and is recognized in such decisions of the Board as *Lewiston Orchards Irrigation District*, supra, wherein it was pointed out that the irrigation district was created and was operated for the benefit of the particular member landowners. The respondent utility district is created and operated for all of the residents of the district.

D. Other Federal Evaluations of the Character of a Utility District

The Court of Appeals properly gave weight to the uncontroverted claim that income from a district's bonds is exempt from U. S. Income Tax.

This is under the well known provision of the tax law exempting from U. S. Income Tax so called "tax-free municipals" (municipal bonds).

Also, the Court of Appeals, as has the Board in other cases,[6] considered the voluntary, as opposed to mandatory, coverage of a district's employees for purposes of U. S. Social Security Tax.

The Board has little to say about these evaluations by other federal agencies of a Tennessee utility district, except in footnote 10 on page 15 of its brief, "Nor do we take any position on whether these districts are not political subdivisions under other federal legislation."

It is submitted that these evaluations are significant.

E. "Administered by individuals who are responsible to public officials or to the general electorate."

In its brief, on page 11, the Board states it has heretofore only granted the exemption to entities (1) "cre-

6. See *City of Austell Natural Gas System*, supra; also the lack of such voluntary social security coverage was a factor in *Randolph*, supra.

ated directly by the state" or (2) administered by individuals who are responsible to public officials or to the general electorate."

The Board has not only by this wording changed the criteria from the *Randolph* case, as will hereafter be pointed out, but also it has glossed over the following facts in this record:

(a) The County Judge, an office created by the Tennessee Constitution and whose election by the qualified voters is provided for therein, must hold a hearing, determine the "convenience and necessity" and then appoint as commissioners "those persons nominated in the petition." (R. 39)

(b) The Board further assumes the foregoing *must* be done by the County Judge as an automatic act.

It is basic administrative law that the power to appoint includes the power *not* to appoint, or to reject. The following quote from *McQuillin, Municipal Corporations*, 3rd Edition, Revised, Vol. 3, Section 1270, is appropriate: "The power to appoint an officer confers upon the appointing power the right of deciding the question of the competency of applicants for the services to be performed."[7]

(c) The Board summarily disposes, by footnote 2 on page 4 of its brief, of the fact that the law provides for the election of utility district commissioners by all qualified voters in counties of a certain size.

(d) Further, under certain circumstances, the County Judge fills vacancies in the office of utility district commissioners. It is provided in Section 6-2614, T.C.A.:

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7. See also 42 American Jurisprudence, Public Officers, § 90, pp. 92-99, indicating that the power to appoint to public office involves discretion.

> "Any vacancy shall be filled . . . by vote of the other commissioners then in office. In the event the two (2) commissioners cannot agree upon a new commissioner to fill any vacancy, they shall certify that fact to the county judge or chairman of the county court within thirty (30) days of the date upon which such vacancy occurs, and, thereupon, within ten (10) days the county judge or chairman of the county court shall appoint a third commissioner to fill such vacancy." (R. 49)

(e) Finally, the general ouster law of the state covering publicly elected officials has been specifically held applicable to utility district commissioners.

(f) By a late amendment to Section 6-2617, T.C.A., a copy of the annual audit statement for the district must be forwarded to the office of the Controller of the Treasury of Tennessee within 30 days from the date of its publication, *and a copy of same must be filed with the County Judge.*

(g) Power to subpoena and administer oaths.

These powers, although mentioned by the Board in its brief here (page 5), are not considered important.

The Court of Appeals, however, also considered these powers.

It is respectfully submitted that it is a rare railroad or motor carrier that possesses such powers.

(h) Nature of services rendered by districts.

The truly governmental nature of a district can be seen when it is remembered the types of service rendered include practically all the types of service rendered by any city or town.

There are 270 districts in Tennessee, and many render more than one type of service.

Such typical governmental services as fire protection, police, garbage disposal, sewage disposal, as well as the sale of gas or electricity and many others are rendered by districts, as well as cities and towns, but by very few private companies operated for profit.

(i) The standard of the Board for determining the political subdivision exemption.

In its brief, the Board states the following, commencing on page 11 of its brief:

> "In administering the Act on a national basis, the Board has limited the exemption for political subdivisions to entities that are either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate. *National Labor Relations Board* v. *Randolph Electric Membership Corporation*, 343 F.2d 60, 63-64, N.7 (C.A. 4). This test provides a reasonable and uniform standard for differentiating between essentially private employment relations and those controlled by the state or its components to such an extent that they are properly exempted from statutory coverage."

It is submitted that, in fact, the Board's standard rather than being "reasonable and uniform", not only seems to have varied from case to case, but has been arbitrary and unpredictable.

It has been held that it is not the duty of the Board to determine which employers *should* be within the purview of the Act, but rather which employers *are* within its legal jurisdiction. *Local 833, United Auto Workers*, 116 N.L.R.B. 267, 272 (1956), relying on *Colgate-Palmolive-*

Peet Co. v. *National Labor Relations Board*, 338 U.S. 355, 363 (1949).

In *Local 833, United Auto Workers*, supra, the Board said:

> "The Board's function is to carry out the mandate of Congress embodied in the National Labor Relations Act, as amended. The Board cannot modify the statute to conform to its own notion of desirable policy", citing the *Colgate-Palmolive* case, supra.

In the *Colgate-Palmolive* case, supra, this Court said:

> "It is enough that we find it in the statute, that policy cannot be defeated by the Board's policy - - -. The Board cannot ignore the plain provisions of a valid contract - - - and reform it to conform to the Board's idea of correct policy. To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress - - -."

In its brief here, the Board has actually changed the standard from that it set out itself in its Decision and Direction of Election (R. 61) wherein (R. 64) it states: "The employer in this case is neither created directly by the state, *nor administered by state appointed or elected officials.*" (Emphasis added) This language goes back to identical language in the *Randolph* case.

Herein, in its brief, however, as above quoted, the second part of the standard now is "administered by individuals who are *responsible* to public officials or to the general electorate." (Emphasis added)

Thus, heretofore, presumably if the administrating official were "state appointed" that would be sufficient to assure the exemption. Now, however, the individual who administers the entity, in order for it to be exempt, must

be "responsible" to public officials or to the general electorate. This change may have been made because a utility district commissioner appointed by a county judge can be argued to be "state appointed" but, according to the Board's contention, said commissioner is not "responsible" to "public officials or the general electorate."[8]

The Board has, further, added herein an entirely new test, not mentioned in any of its cases awarding the political subdivision exemption, either the earlier or later cases![9] From its brief on pages 14 and 15, it states "what must be controlling is the manner in which the entity's labor relations are carried on."

To justify its new standard, the Board has, it is submitted, lifted out of context certain language from the *Randolph* decision wherein that court stated that North Carolina's characterization of an entity as a political subdivision is not decisive "since their relation to the state and their actual methods of operation do not fit the label given them." The Board has made the following statement in its brief, starting on page 13:

> "Thus, an entity created and operated by private individuals who are free from state control in fixing terms and conditions of employment may none the less be donominated a 'political subdivision' for particular state purposes that have nothing to do with its 'relation to the state and [its] actual methods of operation'."

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8. Of course, respondent submits, the utility district commissioner is "responsible to public officials or to the general electorate." See pages 26 and 27.

9. In *National Labor Relations Board* v. *Howard Johnson Company*, 317 F.2d 1, Cert. Den., 375 U.S. 920, a case in which the exemption was denied, "control of the employment relationship" was held of "paramount significance." That case, clearly distinguishable from the case at bar, involved the operation of a restaurant under contract with the New Jersey Turnpike Authority.

It is submitted that this zealous attempt to justify its new standard is clearly shown by the Board's insertion of the words "who are free from state control in fixing terms and conditions of employment", which, as aforesaid, nowhere appear in the *Randolph* decision, nor do said words appear in any of the Board's prior decisions with reference to "political subdivisions." See footnote 9, supra.

When all of this is considered in light of the Board's varying position as to the effect of state characterization, it is submitted, the Board's standard is far from reasonable and uniform. In the very late decision of *Lewiston Orchards Irrigation District*, 186 NLRB #121, denying the political subdivision exemption, just about the only thing relied upon was the Idaho case law and statutes, though the factors involved were fully enumerated.

It is, further, respectfully submitted that even in a situation where an employee works for a city or a state, such as a city garbage collector, or a state highway patrolman, the head of the city or state does not actually "supervise" the employee. The employee is actually supervised by a subordinate employee and not by the mayor or governor, or for that matter, probably not by any elected official.

This is no different from the case of the respondent utility district. Of course, the county judge does not directly supervise the utility district's employees; a supervisor hired by the commissioners of the utility district does so, just as a supervisor hired by the city and not the mayor, "directly" supervises a garbage collector.

In two other of its very late cases wherein the governmental subdivision exemption was approved by the Board, "employment relations" appear to be carried on exactly as the district did.

In *Fayetteville-Lincoln County Electric System*, 183 NLRB #19, 74 LRRM 1278 (June 8, 1970) an electric company was involved. It was established as a result of a private act of the Tennessee Legislature, being Chapter No. 8 of the Private Acts of Tennessee of 1963, Section 4 of which is set out in the Appendix, infra, at pages A10-A11; the utility operates in accordance with the provisions of this Private Act and the Tennessee Municipal Electric Plant Law. Section 6-1507, T.C.A., is the relevant section of the Tennessee Municipal Electric Plant Law, and is copied in the Appendix, infra, at pages A3-A4.

The *Fayetteville-Lincoln County Electric System* is run by a board of public utilities, which board consists of seven members appointed by the mayor and approved by the Board of Aldermen of the city. Two of the appointees must be residents of the municipality and *property holders* of the municipality. According to Section 4 of the Private Act, "four of the appointees shall *own property* and reside outside the corporate limits of Municipality, and shall be electric consumers of the consolidated electric system." (Emphasis added) The seventh member of the board must be an alderman of the municipality.

The National Labor Relations Board held that the *Fayetteville-Lincoln County Electric System was* a "political subdivision" and thus not an "employer" within the meaning of Section 2(2) of the Act.

The commissioners of the utility district in the case at bar do not have to own property and do not have to be consumers of gas. They must only be "residents of the district." Section 6-2602, T.C.A. (R. 23)

The Board found in the *Fayetteville* case that "the utility's affairs are administered by a Board of Trustees who are appointed by elected officials." However, the

mayor did not have discretion to appoint anyone he wanted in the city or county. Rather, he was required to appoint property holders and consumers of electricty.

Also in *City of Austell Natural Gas System and International Chemical Workers Union*, 186 NLRB #44, the Board, on October 31, 1970, held that a municipally owned natural gas system was not an "employer" within the meaning of the Act and said nothing about how "the labor relations are carried on."

The system was created by a special act of the state's legislature, was administered by trustees, approved by the city's mayor and council, and had the right of eminent domain.

The system paid no federal or state income tax and no sales tax.

Its employees were placed under social security like city employees.

3. A. The Board has not here even followed its own decisions.

The Court of Appeals below commented "The Board had not here even followed its own *prior* decisions."

To this must be added, the Board here has not followed its subsequent decisions.[10]

It is submitted that there is not a single Board decision, before or since, where the total number of relevant factors, as well as the strength of the particular factors,

10. The Board, acting through its Regional Director, in a case decided one month before the one at bar, held another Tennessee utility district with identical power exempt as a political subdivision. Case #26-RC-2972, *The West Tennessee Public Utility District of Weakley, Carroll and Benton Counties, Tennessee.* (R. 110-112)

so compels the conclusion that the entity is exempt as they do here.

The Court of Appeals cited four prior cases of its own which the Board has not followed. The pertinent factors listed by the Board in each case were:

A. *Mobile Steamship Authority* (1938), supra.

1. Created by specific legislation of Alabama.

B. *Oxnard Harbor District* (1941), supra.

1. Organized by district residents under enabling legislation of State of California.
2. Governed by board elected by qualified voters
3. Commissioners are subject to recall.
4. Right of eminent domain.
5. County supervisors may tax to pay expenses of district and to pay its bonds.

C. *New Jersey Turnpike Authority* (1954), supra.

1. Three members appointed by the governor.
2. Established for purpose of constructing, operating and maintaining turnpikes and to finance same by issuance of bonds.
3. Power of eminent domain.
4. Neither the faith and credit of the state, nor the taxing power, is pledged to the payment of bonds.
5. Bonds and property tax exempt.

D. *New Bedford, Wood's Hole, Martha's Vineyard Steamship Authority* (1960), supra.

1. State law characterization controlling.
2. Created by Massachusetts statute.

3. Consists of members appointed and removed by governor with advice and consent of executive council.

4. Must submit annual report to governor and state legislature.

5. Neither its property nor bonds subject to state taxation.

Recently, the Board has decided that two entities, above referred to, are exempt and has listed the following factors:

A. *Fayetteville-Lincoln County Electric System* (June, 1970), supra.

1. Entity established pursuant to private act of Tennessee legislature in accord with provisions of Tennessee Municipal Electric Plant Law.

2. Run by a board of seven appointed by mayor and approved by Board of Aldermen. Six of seven must be property holders and four must be consumers of electricity.

B. *City of Austell Natural Gas System* (October, 1970), supra.

1. System created by special act of legislature.

2. Administered by trustees approved by mayor and city council.

3. Right of eminent domain.

4. Interest income to holders of system's certificates is exempt from Federal Income Tax.

5. Under social security and workmen's compensation as are city employees.

6. Pays no Federal or State Income Tax and no State Sales Tax.

It is significant that in none of these cases is there even mentioned the manner in which the entity's "labor relations are carried on," which petitioner here asserts as "what must be controlling." (Pages 14 and 15 of its brief)

Actually, the Board's entire case here seems to rest on the fact that the district's commissioners are not appointed by a governor or a mayor. The Board really gives no weight, or very little weight, to anything else. It has not considered *all* factors.

It is thus submitted that, not only has the Board not followed the controlling federal law, the *Randolph* rule, but it also demonstrates a complete lack of familiarity with a Tennessee county, which is like counties in many other states. The County Judge who appointed the Hawkins County Utility District commissioners occupies the top executive and administrative position in county government; he is elected by the voters of the county, and he is to the county what the governor is to the state and the mayor to the city. It is submitted, as aforesaid, he also has the implicit right not to appoint, and he does fill vacancies.

Accordingly, as aforesaid, there is not one Board decision awarding the political subdivision exemption in which the factors so clearly compel that result as they do here.

3. B. The Randolph case distinguished on its facts.

The Court of Appeals in the *Randolph* case correctly decided that the entity involved in that case was not exempt. Similarly, the Court of Appeals below correctly held that a Tennessee utility district is exempt.

The Court of Appeals here actually followed the rule of the *Randolph* case, supra, but distinguished the facts.

The Board in the case at bar compared a North Carolina Electric Membership Cooperative in the *Randolph* case with a Tennessee utility district and erroneously held them to be substantially similar and, on that ground, ruled that the respondent was not a "political subdivision."

The following are the significant differences between the North Carolina and the Tennessee legislation:

(a) Under the Tennessee Utility District Act, the district may furnish one or more types of service, including fire, police, garbage collection, etc., to all persons in the district and has an exclusive franchise for same in the designated area.

However, Section 117-16 of the General Statutes of North Carolina (App., infra, pp. A11-A12) makes it clear that only "members" are entitled to get electric power from the North Carolina Electric Membership Corporation.

Section 117-16 provides as follows: "The corporate purpose of each corporation formed hereunder shall be to render service to *its members only* - - -." (Emphasis added)

In North Carolina, other members of the public are not entitled to get service from it, and in fact, are prohibited from getting service from it.

The case of *Bailey* v. *Carolina Power Company*, 212 N.C. 768, 195 S.E. 64 (1938), held that persons not members of the electric membership corporation could not maintain an action challenging the validity of the acts of the director of the corporation, and, that the fact that a person is a member of the community, or a resident of the territory, in which an electric membership corporation is authorized to operate, or might be eligible for membership therein, does not entitle him to service by such corporation.

Thus, a North Carolina electric membership corporation exists solely for the benefit of its members; a Tennessee utility district exists and has the exclusive right to provide governmental services to citizens in certain areas and is similar to a city or town. Further, among the types of services that may be rendered by a utility district, are such traditionally governmental services as fire, police, street lighting, garbage collection, etc.

(b) The Tennessee Utility District Act provides that the district not only has the power of eminent domain, but can exercise it even against other governmental entities. (R. 28-29)

On the other hand, by Section 117-18(6) of the General Statutes of North Carolina (App., infra, p. A12), it is specifically provided that an Electric Membership Corporation does not have the eminent domain power, but, in all questions pertaining thereto, must apply to a different agency whose ruling shall be final.

(c) Section 6-2707, T.C.A. (R. 41), provides that, once formed, a Tennessee utility district shall be the *only* public corporation empowered to perform its services within its district.

On the other hand, it was held in the case of *Pitt and Greene Electric Membership Corporation* v. *Carolina Power and Light Company*, 255 N.C. 258, 120 S.E.(2) 749 (1961), that a North Carolina electric membership corporation and a privately owned public utility corporation are free to compete in rural areas, unless restricted by contract.

(d) Section 117-13 of the North Carolina Act (App., infra, p. A11) provides that each electric membership corporation shall have a board of directors to be elected annually by the members, and the powers of the corporation shall be vested in said board. This procedure resembles

the election of stockholders and directors of a private corporation and is to be contrasted with that followed to select the commissioners of the Tennessee utility district. Said commissioners are appointed by the County Judge, or are elected at general elections.

Also, of great significance is the fact that profits (similar to dividends) inure to the exclusive benefit solely of the members (similar to stockholders) of the electric membership corporation; while the district, under Section 6-2625, T.C.A. (R. 36), may only charge such rates as to remain self-supporting, and all users in the entire area are affected by rate changes, the same as rates charged by a city and/or a town for governmental services affect all users in the city and/or town.

(e) In respondent's answer to the statement of the case, respondent has set out on pages 4 through 13 certain other factors which lead to the conclusion that the utility district is a "political subdivision." None of these factors are provided for under the North Carolina Act.

4. The Court of Appeals below under existing federal law and applying the correct standard of judicial review properly denied enforcement of the Board's order since petitioner was exempt as a political subdivision.

As has been quoted heretofore from the *Randolph* decision, supra, *"To the extent* that it has taken into account economic realities as well as the statutory purposes, the Board's determination is entitled to great respect." (Emphasis added)

Thus, if the Board to an improper and/or inadequate extent has taken into account economic realities, as well as the statutory purposes, its determination is not entitled to great respect. It is submitted that this is what happened here.

The Court of Appeals found that the Board had not considered the "economic realities" and statutory purposes as required by *Randolph* and then proceeded to, itself, consider the "economic realities and statutory purposes" and correctly decided that the respondent utility district was a political subdivision."

This appears to be the proper standard of review in determining the political subdivision exemption, which is, in essence, a determination of jurisdiction, as well the proper standard as in other matters of "coverage" (see cases referred to in footnote 5 on page 10 of the Board's brief).

It is submitted, however, that the Board's expertise in labor relations is obviously greater there, than in the area of characterizing a political subdivision of a state. As the Court of Appeals below stated (R. 154), "The present case involves more of a question of municipal law than a labor problem."

The labor law flavor of the typical coverage question is obviously more pronounced than in the determination involved here."

It should be remembered that most of the facts in this record are undisputed, and the effect of the Board's determination is to bring the District under its jurisdiction. The Board in its brief, on page 9, and again on page 18, infers that the Court below reached its decision "on a de novo evaluation of the facts."

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11. Whether an individual is an "employee", *National Labor Relations Board* v. *Hearst Publications*, 332 U.S. 102, a "supervisor", *Local 207, International Association, et al.* v. *Perko*, 373 U.S. 701, an "independent contractor," *National Labor Relations Board* v. *E. C. Atkins*, 331 U.S. 398, or an entity is a "labor organization", *Marine Engineers Beneficial Assoc.* v. *Interlake Steamship Company*, 370 U.S. 173, it is submitted, are more within the realm of the Board's expertise than whether an entity is a political subdivision.

It is submitted that the Court of Appeals here reviewed the Board's determination in light of the foregoing and was completely correct in so doing.

From *National Labor Relations Board* v. *Highland Park Manufacturing Company*, 341 U.S. 322, the following, commencing at page 325, is quite appropriate here:

> "The further contention is advanced by the Board that the administrative determination that a petitioning labor organization has complied with the Act is not subject to judicial review at the instance of an employer in an unfair labor practice proceeding. If there were dispute as to whether the C.I.O. had filed the required affidavits or whether documents filed met the statutory requirements and the Board had resolved that question in favor of the labor organizations, a different question would be presented. But here there is no question of fact. While the C.I.O. officers have since filed the affidavits, they were not on file at any time relevant to this proceeding.
>
> It would be strange indeed if the courts were compelled to enforce without inquiry an order which could only result from proceedings that, under the admitted facts, the Board was forbidden to conduct. The Board is a statutory agency, and, when it is forbidden to investigate or entertain complaints in certain circumstances, its final order could hardly be valid. We think the contention is without merit and that an issue of law of this kind, which goes to the heart of the validity of the proceedings on which the order is based, is open to inquiry by the courts when they are asked to lend their enforcement powers to an administrative tribunal."

Also as stated in *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 482 (1951), quoting from the Administrative Procedure Act, 5 U.S.C. §1010(e) (1964): "So far as necessary to decision and where presented, the reviewing [federal] court shall decide all relevant questions of law."

VI. CONCLUSION

The Court of Appeals *did* consider the "economic realities" and statutory purposes (R. 151-152).

The Court of Appeals further pointed out that "it was the clear intention of Congress not to make amenable to the National Labor Relations Act employees of either federal or state governments. The effect of the order of the Board in the present case may be to extend its jurisdiction over public employees in nearly 270 utility districts in Tennessee, which districts perform a wide variety of public functions." (R. 154)

It is clear that in the Court of Appeals' opinion below, the several sentences strongly relied on by petitioner (page 7 of its brief) were not necessary to the result. The Court of Appeals' decision, when considered as a whole, can be seen to have followed the rule of the *Randolph* case. The Court of Appeals thoroughly analyzed the entire picture and reached the correct result. At most, the sentence or two at the end of the opinion below merely sets forth an additional reason for the result reached in the case.

Accordingly, it is respectfully submitted that the judgment below should be affirmed.

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The relevant provisions of the Tennessee Utility District Act of 1937, as amended (Tennessee Code, Title 6, Chapter 26, Sections 6-2601, et. seq.) in addition to those listed in petitioner's brief on pp. 21-30 thereof, other relevant Tennessee statutes, North Carolina statutes, and a provision of the Tennessee Constitution are as follows:

Tennessee Code

5-501. Organization of court.—The county court consists of the justices of the county. It is divided into a quarterly and monthly court, the first being held by all justices or such number of the justices as is necessary to transact business, the latter by the chairman or judge of the county court. No discontinuance of process, or any matter or thing depending in said court, shall be produced by a failure to hold court at any regular session.

5-601. Election of chairman.—The justices of the peace of said court, a majority of all the justices of the county being present, at their first term in every year, except in counties where a county judge is provided for, shall elect a chairman, who holds his office for one (1) year and until his successor is appointed, and who presides over the deliberations of the court, and performs such other duties as now are or may be assigned him by law.

6-318. Municipal property and services.—Upon adoption of an annexation ordinance or upon referendum approval of an annexation resolution as hereinabove provided, an annexing municipality and any affected instrumentality of the State of Tennessee, such as, but not limited to, a utility district, sanitary district, school district, or other public service district, shall attempt to reach agreement in writing for allocation and conveyance to the annexing municipality of any or all public functions, rights, duties, property, assets and liabilities of such state instru-

mentality that justice and reason may require in the circumstances. Provided, however, that any and all agreements entered into before March 8, 1955 relating to annexation shall be preserved. The annexing municipality, if and to the extent that it may choose, shall have the exclusive right to perform or provide municipal and utility functions and services in any territory which it annexes, notwithstanding §6-2607 or any other statute, subject, however, to the provisions of this section with respect to electric cooperatives. Subject to such exclusive right any such matters upon which the respective parties are not in agreement in writing within sixty (60) days after the operative date of such annexation shall be settled by arbitration with the laws of arbitration of the state of Tennessee effective at the time of submission to the arbitrators and subsection (2) of §23-501, shall not apply to any arbitration arising under §§6-308—6-320. The award so rendered shall be transmitted to the chancery court of the county in which the annexing municipality is situated, and thereupon shall be subject to review in accordance with §§23-513—23-515 and 23-518.

If the annexed territory is then being provided with a utility service by a state instrumentality which has outstanding bonds or other obligations payable from the revenues derived from the sale of such utility service, the agreement or arbitration award referred to above shall also provide (a) that the municipality will operate the utility property in such territory and account for the revenues therefrom in such manner as not to impair the obligations of contract with reference to such bonds or other obligations, or (b) that the municipality will assume the operation of the entire utility system of such state instrumentality and the payment of such bonds or other obligations in accordance with their terms. Such agreement or

arbitration award shall fully preserve and protect the contract rights vested in the holders of such outstanding bonds or other obligations.

6-604. Extension of utility services.—Except as provided in §6-2608, each county, utility district, municipality or other public agency conducting any utility service specifically including water works, water plants and water distribution systems and sewage collection and treatment systems is authorized to extend such services beyond the boundaries of such county, utility district, municipality or public agency to customers desiring such service.

Any such county, utility district, municipality or other public utility agency shall establish proper charges for the services so rendered so that any such outside service shall be self-supporting.

No such county, utility district, municipality or public utility agency shall extend its services into sections of roads or streets already occupied by other public agencies rendering the same service so long as such other public agency continues to render such service.

6-1507. Creation of board.—Any municipality, excepting those which employ a city-manager or which have a population of less than two thousand (2,000), issuing bonds under the provisions of §§6-1501—6-1534 for the acquisition of an electric plant shall, and any municipality now or hereafter owning or operating an electric plant under §§6-1501—6-1534 or any other law may, appoint a board of public utilities (hereinafter called the "board").

The board shall be created in the following manner: At the time the governing body of a municipality issuing bonds hereunder determines that a majority of the qualified voters voting on the election resolution have assented to the bond issue for the acquisition of an electric plant.

the chief executive officer of the municipality shall, or if no such bonds are issued, or if the municipality employs a city-manager or has a population of less than two thousand (2,000), then at any time he may, with the consent of the governing body of the municipality, appoint two (2) or four (4) men from among the property holders of such municipality who are residents of the municipality and have resided therein for not less than one (1) year next preceding the date of appointment to such board. No regular compensated officer or employee of a municipality shall be eligible for such appointment until at least one (1) year after the expiration of the term of his public office.

6-2608. Power to operate utilities.—Any district heretofore or hereafter created under authority of this chapter is empowered to conduct, operate and maintain a system or systems for the furnishing of water, sewer, sewage disposal, natural gas, artificial gas, police, fire protection, garbage collection and garbage disposal, street lighting, parks and recreational facilities, transit facilities, transmission of industrial chemicals by pipeline to or from industries or plants located within the boundary of the district, community antenna television service, except for community antenna television service in counties having a population of more than 60,000 but less than 60,100, according to the 1960 federal census, or two (2) or more of such systems, and to carry out such purpose it shall have the power and authority to acquire, construct, reconstruct, improve, better, extend, consolidate, maintain and operate such system or systems, within or without the district, and to purchase from, and furnish, deliver and sell to any municipality, the state, any public institution and the public, generally, any of the services authorized by this chapter; provided, that with respect to the conduct and operation of a

police protection system nothing contained in this chapter shall be construed as meaning or intending any encroachment upon the police powers of the sheriff of any county in this state, but shall only empower the district to conduct and operate such police protection system when it is enabled to do so through legal arrangements with the sheriff of the county, and other constituted authorities, in a manner consistent with all provisions of the Constitution of Tennessee; and provided, further that the inclusion of the power of conducting and operating a police protection system as one of the purposes for which a district may be created, shall not in any wise affect the validity of this section the legislature hereby expressly declaring its purpose to enact the remainder of this section without the provision herein contained authorizing the conduct and operation of a police protection system if the inclusion of such provision should be held to be invalid. The term "transit facilities" shall include all real and personal property needed to provide public passenger transportation by means of trolley coach, bus, motor coach, or any combination thereof including terminal, maintenance and storage facilities. Such community antenna television service shall be limited to: (1) charging for wire or cable service only on the basis of fixed monthly charges and with no per program charges; (2) and for such wire or cable service only to programs transmitted from television stations licensed by the federal communications commission; (3) and for such wire or cable service only to programs broadcast free of charge to the entire viewing public; (4) and without altering any characteristic of the incoming signal other than its frequency and amplitude, including but not limited to altering the program content, including station breaks. by addition or deletion. Such community antenna television service shall include the right to acquire and hold such real and personal property as may be needed to ac-

complish the foregoing. Provided, however, that districts created on or after July 1, 1967, shall be empowered to furnish only those services stated in the order creating the district. Districts incorporated before July 1, 1967, shall be authorized to furnish only the services being furnished on that date, or which will be furnished by facilities to be constructed from the proceeds of bonds issued not later than July 1, 1968. Supplemental petitions for authority to furnish other services contained in this section may be addressed to the county judge or chairman of the county court, who shall give notice and hold hearings on such petitions in the same manner, on the same issues. and under the same conditions as for original incorporation.

A system or facilities for "the transmission of industrial chemicals by pipeline," as used herein shall mean and include facilities or a system used or useful in the transmission by pipeline of industrial chemicals and related commodities, in liquid, gaseous, or solid form, including raw materials, processed products, or by-products, to or from plants or industries located within the boundary of the district, on an individual basis, or in company with other plants, and to or from docks, terminals or tank farms located within or without the boundary of the district, but within the same county. Such system or facilities shall include, but not be limited to, the pipelines, docks, terminals, tank farms, compressor stations, storage and temperature treatment facilities, rights-of-way, and together with all real and personal property and equipment appurtenant to, or useful in connection with, such facilities. Before any district shall be authorized to conduct, operate or maintain such system or facilities for transmission of industrial chemicals by pipeline, as provided hereby, the board of commissioners thereof, whether previously installed in such office or nominated only, shall submit a

petition signed in their own names to the county judge or chairman of the county court in which the order approving the creation of the district was or shall be entered, whereupon the county judge or chairman shall, upon notice published as provided by §6-2604 and public hearing, determine whether or not the project so proposed will promote industry and develop trade to provide against low employment, and enter an order of the court so finding. On the issue of whether or not industry, trade and employment will be so promoted and developed, the county judge or chairman shall take into consideration the plants proposed to be served by the facilities for transmission of industrial chemicals by pipeline, but no project so proposed to be undertaken shall be found not to promote and develop industry, trade and employment for either of the following reasons: (1) that the project will provide service for a single plant; or (2) that the project will serve to maintain existing industry and employment rather than encourage new industry and additional employment. Any party in interest, including any subscriber to existing services of the district, shall have the right of appeal from said order as provided by §6-2606, but no consent to the undertaking of such district services by any number of existing subscribers shall be required, the provisions of §6-2609 notwithstanding.

Incorporated cities and towns having a population of 5,000 or over shall have the prior right as respects utility districts to extend water, sewer or other utilities in any territory within five (5) miles of their corporate limits; where an incorporated city or town has a population of less than five thousand (5,000), the limit shall be three (3) miles; provided, that this provision shall not apply within the boundaries of a utility district or to facilities heretofore extended by a utility district beyond its boundaries;

and provided, further, that a utility district may extend water, sewer or other utility facilities into such an area through agreement with the city or town concerned. A city or town shall lose its prior right under the following conditions: (1) where an agreement cannot be reached, the utility district, by a resolution setting out the area to be served and the type of utility, shall notify the city or town of its intention to serve the area; (2) after receipt of such notice, the city or town shall have sixty (60) days in which to adopt an appropriate ordinance or resolution determining to serve the area within a specified time; the utility district may within ten (10) days appeal to the county judge or chairman of the county court of the county in which the major part of the land area is located if it considers the time so determined is too long, whereupon the county judge or chairman after hearing both parties shall determine a reasonable time for the city or town to provide the services, and further appeal may be taken by either party as provided in §6-2606 and (3) upon failure of the city or town to provide the services within the time so determined, the utility district shall be authorized to serve any part of the area not already served by the city or town.

Section 6-2619, authorizing the issuance of revenue bonds for the purpose of constructing, acquiring, reconstructing, improving, bettering or extending any facility or system authorized by this chapter, being "The Utility District Law of 1937," is hereby made applicable to any district undertaking to exercise the power conferred by this section to conduct, operate and maintain a system or facilities for the transmission of industrial chemicals by pipeline.

6-2612. General implementing powers.—Any district created pursuant to the provisions of this chapter shall be

vested with all the powers necessary and requisite for the accomplishment of the purpose for which such district is created, capable of being delegated by the legislature. No enumeration of particular powers herein created shall be construed to impair or limit any general grant of power herein contained nor to limit any such grant to a power or powers of the same class or classes as those enumerated. The district is empowered to do all acts necessary, proper or convenient in the exercise of the powers granted herein.

6-2617. Publication of annual statement.—Within ninety (90) days after the close of the fiscal year of each district organized and operating under the provisions of this law, the commissioners of the district shall publish in a newspaper of general circulation, published in the county in which the district is situated, a statement showing (a) the financial condition of the district at the end of the fiscal year; (b) the earnings of the district during the fiscal year just ended; (c) a statement of the water rates then being charged by the district, and a brief statement of the method used in arriving at such rates.

In addition to the requirements listed in the first paragraph, the annual audit shall show the outstanding indebtedness of the district, the date contracted, the rate of interest paid and purpose for which issued, and the date of maturity thereof. A copy of such annual statement or audit shall be filed with the county judge or judges where publication is required in accordance with this section and §6-2635, and a copy forwarded to the office of the controller of the treasury of the state of Tennessee within thirty (30) days from the date of such publication. The failure to file such copies shall be a misdemeanor.

8-3811. Payments by political subdivisions.—Each political subdivision as to which a plan has been approved under §§8-3808—8-3810 shall pay into the contribution

fund, with respect to wages (as defined in §8-3801), at such time or times as the state agency may by regulation prescribe, contributions in the amounts and at the rates specified in the applicable agreement entered into by the state agency under §8-3803.

Any other provision of law to the contrary notwithstanding, amounts equal to the taxes under the Federal Insurance Contributions Act payable by the employer in behalf of class A members for the period beginning January 1, 1956, and ending June 30, 1961, shall be paid from any unexpended amounts heretofore or hereafter appropriated or otherwise made available for the Tennessee state retirement system for such period. This provision shall not be extended or otherwise be deemed effective with respect to such appropriations or other amounts for any period subsequent to June 30, 1961.

9-1202. Definition of terms.—* * *

(a) The term "municipality" shall mean any county city, town, township, utility district, and sanitary district of this state;

Tennessee Private Acts of 1963, Chapter 8

SECTION 4. *Be it further enacted*, That such Board shall consist of seven members appointed by the Mayor of said Municipality and approved by its Board of Aldermen. Two of the appointees shall be residents of Municipality, qualified as provided in TCA 6-1507 et seq, as amended. Four of the appointees shall own property and reside outside the corporate limits of Municipality, shall be electric consumers of the consolidated electric system and otherwise shall be qualified as provided in the aforesaid TCA 6-1507 et seq, as amended. The initial terms of these initial six appointees shall be as follows: Two shall serve for

one year; two shall serve for two years; and two shall serve for three years. Succeeding appointees shall serve three year terms. Any appointee may be appointed to successive terms. The seventh member of the Board shall be an Alderman of Municipality, whose term of office shall be fixed by the Mayor, but shall not extend beyond his term as alderman.

General Statutes of North Carolina

§ 117-13. Board of directors; compensation; president and secretary.—Each corporation formed hereunder shall have a board of directors and the powers of a corporation shall be vested in and exercised by a majority of the directors in office. The directors of the corporation, other than those named in its certificate of incorporation, shall be elected annually by the members entitled to vote, but if the bylaws so provide the directors may be elected on a staggered term basis: Provided, that the total number of directors on a board shall be so divided that not less than one third of them, or as nearly thereto as their division for that purpose will permit, shall be elected annually, and no term shall be longer than for three years; and provided further that, except as may be necessary in inaugurating such a plan, all directors shall be elected for terms of equal duration. The directors must be members and shall be entitled to receive for their services only such compensation as is provided in the bylaws: Provided, that such compensation shall not exceed twenty dollars ($20.00) for each day of their attendance at meetings for which their attendance has been duly authorized. The board shall elect annually from its own number a president and a secretary.

§ 117-16. Corporate purpose, terms and conditions of membership.—The corporate purpose of each corporation formed hereunder shall be to render service to its mem-

bers only, and no person shall become or remain a member unless such person shall use energy supplied by such corporation and shall have complied with the terms and conditions in respect to membership contained in the by-laws of such corporation: Provided, that such terms and conditions of membership shall be reasonable; and provided further, that no bona fide applicant for membership, who is able and willing to satisfy and abide by all such terms and conditions of membership, shall be denied arbitrarily, or capriciously, or without good cause.

§ 117-18. Specific grant of powers.—Subject only to the Constitution of the State, a corporation created under the provisions of this article shall have power to do any and all acts or things necessary or convenient for carrying out the purpose for which it was formed, including, but not limited to:

. . .

(6) The right to apply to the North Carolina Rural Electrification Authority for permission to construct or place any parts of its system or lines in and along any State highway or over any lands which are now, or may be, the property of this State, or any political subdivision thereof. In all questions involving the right of way, or the right of eminent domain, the rulings of the North Carolina Electrification Authority shall be final.

Constitution of the State of Tennessee, Article 6

Sec. 15. Districts in counties—Justices and constables—Number—Term—Removal from district.—The different Counties of this State shall be laid off, as the General Assembly may direct, into districts of convenient size, so that the whole number in each County shall not be more than twenty-five, or four for every one hundred square miles. There shall be two Justices of the Peace and one

Constable elected in each district by the qualified voters therein, except districts including County towns, which shall elect three Justices and two Constables. The jurisdiction of said officers shall be co-extensive with the County. Justices of the Peace shall be elected for the term of six, and Constables for the term of two years. Upon the removal of either of said officers from the district in which he was elected, his office shall become vacant from the time of such removal. Justices of the Peace shall be commissioned by the Governor. The Legislature shall have power to provide for the appointment of an additional number of Justices of the Peace in incorporated towns.